

**FACILITY USE AGREEMENT BETWEEN THE CITY OF TOMBALL
AND THE TOMBALL FARMERS MARKET**

This Facility Use Agreement is made and entered into this 7th day of February 2022, by and between the City of Tomball (City) and the Tomball Farmers Market (TFM), a Texas nonprofit corporation.

WHEREAS, the City is the owner of the City Parking Lot, located at 205-W Main Street, Tomball, Texas as referenced in Exhibit A; and

WHEREAS, the City and the TFM agree that the TFM is an independent contractor with respect to the services provided pursuant to this agreement, nothing in this agreement shall be considered to create the relationship of employer and employee between the parties hereto; and

WHEREAS, it is in the City's and the public's interest to allow TFM to use the City Parking Lot property, referenced as the "Site", for operation of the Tomball Farmers Market, subject to the terms specified within this Agreement;

NOW THEREFORE, in consideration of the promises and commitments made herein, the sufficiency of which is hereby acknowledged, it is agreed as follows:

1. Premises:

The City hereby agrees to allow TFM to use the Site, graphically depicted on Exhibit "A", a copy of which is attached and incorporated by this reference, for the sole purpose of operating a farmers market upon the following terms and conditions.

2. Term:

For planning purposes, this Agreement shall be deemed in full force and effect as of the date of execution. The use permitted under this Agreement shall be on the dates and times specified herein. This Agreement may be renewed for additional one-year terms upon written, mutual agreement between the City and TFM..

3. Use:

TFM shall use said Premises for the sole purpose of operating a farmers market. All other uses are expressly prohibited without the prior written consent of the City Manager.

Parking for vendors will be located at 105-A Cherry Street, as designated by TFM, in order to provide adequate parking for customers.

Products to be sold at the farmers market include, but are not limited to, fresh farm, organic and local products; processed farm, organic and local foods; baked goods and grain products; artisan/craft products; trees or plants; and distribution of educational and free informational or promotional items.

4. Improvements and Alterations:

TFM shall make no alterations or improvements to or upon the Premises, or install any fixtures (other than trade fixtures which can be removed without injury to the Premises) without first obtaining written approval from the City Manager or his designee.

5. Rental Fees:

In executing this Agreement, the parties expressly agree and affirm that the use permitted herein is without charge.

6. Dates and Hours of Operation:

Regular Farmers Market:

The TFM shall have use of the Site beginning January 30, 2022 and continuing through December 31, 2022; thereafter, the TFM shall have use of the Site beginning January 1 and ending December 31 of each year, with the exception of the dates for the two Tomball Sister City German Festivals, during which time the City owned property will be unavailable for use by the TFM. Such use shall be open for business hours between 9:00 a.m. and 1:00 p.m. on Saturdays. Times may be adjusted by TFM as needed with written notification to the City. See Amendment added January 11, 2022.

- Market season is expected to begin in January and continue through December of each year.
- General. The City agrees the Site shall be available two (2) hours prior to the times established above for set-up purposes. The TFM agrees to clean up and vacate the Site no later than two (2) hours after the stated time of the market as referenced previously.

Sunset Market:

TFM shall have use of the Site for a Sunset Farmers Market 3 times per year during the months in March & December of each year each due to the occurrence of the Tomball German Festival.

- A third additional Sunset Market may be held in cooperation with Texas National Night Out which occurs the first Tuesday in October every year and is subject to the same hours of operations and guidelines within this contract. Times may be adjusted by TFM as needed with written notification to the City and with the City's approval.

Use of the Site can not interfere with Set-up or take down for the Tomball German Festival during which time the City owned property will be unavailable for use by the TFM. Such use for TFM Sunset Markets shall be open for business hours between 4:00 p.m. and 7:00 p.m. on (1) Wednesday Evening during the months of March and December (unless there is a scheduling problem, and the Tomball German Festival convenes during a different month.)

The addition of 3 additional Sunset Markets is subject to the adhering to the guidelines in this contract. Times may be adjusted by TFM as needed with written notification to the City and with approval by the City.

- General. The City agrees the Site shall be available two (2) hours prior to the times established above for set-up purposes. The TFM agrees to clean up and vacate the Site no later than two (2) hours after the stated time of the market as referenced previously.
- TFM is responsible for ensuring they are in compliance with all federal, state, and local laws, ordinances and regulations applicable to operating a farmers market for the above-mentioned Sunset Markets.
- Provide all necessary labor, materials, equipment and supplies to run the farmers market safely. Including but to the rental and placement of 2 Tower lights on Site (when applicable) and at least 2 officers on duty for the duration for each of the special sunset farmers markets.
- TFM must provide and place barricades and caution tape to secure the Site for the Sunset farmers market no later than 6:00 a.m. the day of each Sunset Farmers Market.

7. Duties of the TFM:

- The TFM agrees to include in its vendor guidelines and market promotion that the farmers' market will adhere to the City's policy of no smoking in city parks and public facilities.
- The TFM agrees to give local farmers priority in taking part in the farmers market.
- The TFM is responsible for obtaining all permits, certificates and licenses necessary to operate a farmers market.
- The TFM is responsible for all operation and management duties, including but not limited to:
 - Setting up and closing the market, putting up signs and banners.
 - Removing trash and debris.
 - Managing the number of vendors and their stall positions.
 - Collecting fees, ensuring vendors are in compliance with necessary business liability insurance, permits and licensing as required by federal, state and local entities.

- Provide all necessary labor, materials, equipment and supplies to run the farmers market safely.
- Resolve issues such as prices, stall locations, eligible foods/products, etc.
- Complying with all federal, state, and local laws, ordinances and regulations applicable to operating a farmers market.
- Enforcing guidelines and marketing the Tomball Farmers Market.

The TFM understands that this agreement and the terms described above solely cover the use of the Site for the specified days for the farmers market. Any additional uses of the Site may be subject to rental fees.

8. Indemnification/Hold Harmless:

TFM shall defend, indemnify and hold harmless the City of Tomball, its officers, officials, employees and volunteers from and against any and all claims, injuries, damages, suits including reasonable attorneys' fees, actions or liabilities for injury or death of any person, or for loss or damage to property, which arises out of the use of Site facility or premises or from any activity, work or thing done, permitted, or suffered by User in or about the facility or premises, except only such injury or damage as shall have been occasioned by the sole negligence of the City of Tomball.

9. Insurance:

The TFM shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the use of the Site facility or premises. The TFM shall provide a certificate of insurance evidencing:

- General Liability insurance covering premises, products-completed operations and contractual liability. The City shall be named as an insured on the TFM's General Liability insurance policy. The General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate.
- The insurance policy shall contain, or be endorsed to contain that the TFM's insurance coverage shall be primary insurance as respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the TFM's insurance and not contribute with it.
- The TFM shall provide a certificate of insurance evidencing the required insurance before using the facility or premises.

10. Assignment:

This agreement may not be assigned or transferred without the written approval of the City.

11. Discrimination Prohibited:

In all services or activities and all hiring or employment made possible by or resulting from this Agreement, there shall be no discrimination against any employee or applicant for participation in the farmers market operation because of sex, age (except minimum age and retirement provisions), race, color, creed, national origin, marital status, sexual orientation, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification, in the selection and retention of employees or procurement of materials or supplies. TFM shall observe and fully comply with any and all applicable federal, state, or local law or regulations regarding non-discrimination.

Any violation of this provision shall be considered a violation of a material provision of this Agreement and shall be grounds for cancellation, termination, or suspension, in whole or in part of the Agreement by the City, and may result in ineligibility for further City agreements. The TFM will also comply with other anti-discrimination laws or requirements of any and all jurisdictions having authority.

12. Compliance with All Laws and Regulations:

In using the Premises TFM will comply with all applicable laws, ordinances, and regulations from any and all authorities having jurisdiction. The TFM specifically agrees to comply and pay all costs associated with achieving such compliance without any notice from the City, and further agrees that the City of Tomball does not waive this section by giving notice of demand for compliance in any instance.

The TFM further covenants and agrees that it does not and will not knowingly employ an undocumented worker. An "undocumented worker" shall mean an individual who, at the time of employment, is not,

- (a) Lawfully admitted for permanent residence to the United States.
- (b) Authorized by law to be employed in that manner in the United States.

13. Non-Waiver:

Waiver by the City of any provision of this agreement or any time limitation provided for in this agreement shall not constitute a waiver of any other provision.

14. Captions:

The captions in this Agreement are for convenience only and do not in any way limit or amplify particular provisions.

15. Notice:

Any notice or information required or permitted to be given to the parties under this Agreement may be sent to the following addresses unless otherwise specified in a subsequent written directive:

City of Tomball
David Esquivel, City Manager
401 Market Street Tomball TX 77375

Tomball Farmers Market
Amanda Kelly, Market Manager
14090 FM 2920 Suite G163 Tomball TX 77377

16. Termination:

Either party to this agreement may, after thirty days written notice to the other, may terminate the agreement.

The City may suspend or terminate the Agreement due to emergency circumstances as defined by the City at its sole discretion.

The City may suspend any farmers market(s) due to the need to access City-owned property for other uses with fourteen (14) days written notice to the TFM.

17. Governing Law:

This Agreement shall be governed, construed and interpreted by, through and under the Laws of the State of Texas. Venue for any claims that might flow from this Agreement shall lie exclusively in the federal and state courts of Harris County, Texas.

18. Severability:

If any provision of this Agreement or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Agreement nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

Exhibit A

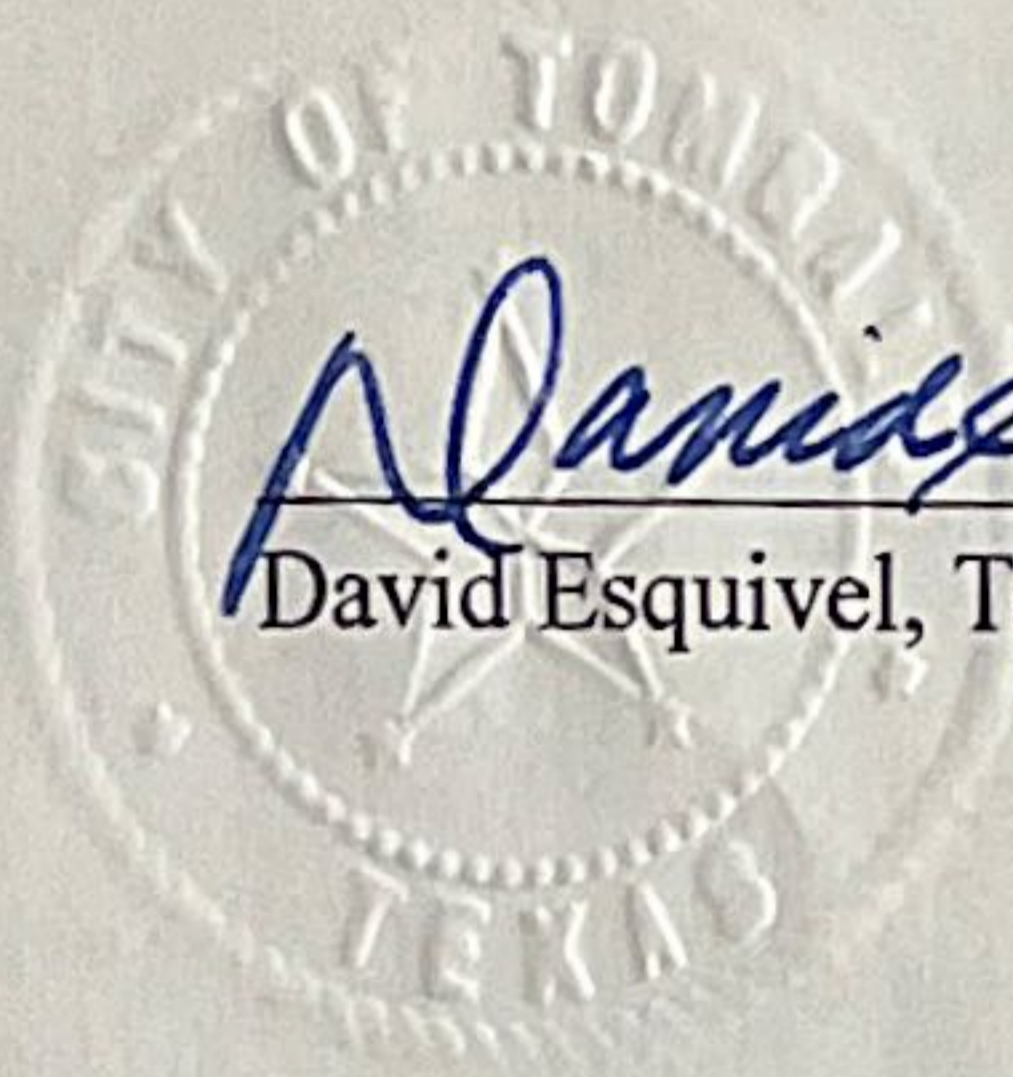


20. Agreement:

By signing below the City of Tomball and the Tomball Farmers Market understand and concur to this Agreement. This Agreement, together with attachments or addenda, represents the entire and integrated agreement between the City of Tomball and the TFM. The parties hereby agree that this document contains the entire agreement between the parties and this Agreement shall not be modified, changed, altered or amended in any way except through a written amendment signed by all of the parties hereto.

IN WITNESS WHEREOF, the City of Tomball and the TFM have executed this Agreement the date and year indicated:

CITY OF TOMBALL



David Esquivel
David Esquivel, Tomball, City Manager

Date: 02/03/22

TOMBALL FARMERS MARKET

Amanda Kelly
Amanda Kelly, TFM Market Manager

Date: 02/09/2022